

RESPONSE TO DEFENDANT'S MOTION TO DISMISS WITH PREJUDICE

The State of Arizona, by and through undersigned counsel, in response to the defendant's Motion to Dismiss/Suppress Independent Chemical Test in the above-referenced case, asks this Court to deny the motion, based upon the arguments set forth in the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

A. FACTS

Although an evidentiary hearing will be necessary to determine the outcome of this Motion, the State submits the following factual scenario.

B. ARGUMENT

It is indeed well-settled in Arizona that following an arrest for DUI, the State may not unreasonably interfere with an accused's reasonable attempts to secure an independent blood test in an effort to establish his sobriety at or near the crucial time under consideration. *Smith v. Cada*, 114 Ariz. 510, 562 P.2d 390 (App. 1977); *Smith v. Ganske*, 114 Ariz. 515, 562 P.2d 395 (App. 1977). It is equally well-settled that police officers are not required to take the initiative or even assist in procuring an independent blood test for a DUI suspect. *Smith v. Cada, supra*. Due process is violated only when the State creates barriers that thwart a suspect's reasonable attempts to gather independent evidence. When such unreasonable interference has occurred, the remedy has, without exception, been dismissal of the charges. *Smith v. Cada, supra*; *Smith v. Ganske, supra*; *McNutt v. Superior Court*, 144 Ariz. 7, 648 P.2d 122 (1982); *Amos v. Bowen*, 143 Ariz. 324, 693 P.2d 979 (App. 1984); *State v. Klein*, 147 Ariz. 77, 708 P.2d 758 (App. 1985).

In *Smith v. Cada, supra*, a suspect arrested for DUI made a request to contact a lawyer and post bond so that he could be released to obtain an independent blood test. His requests went unheeded, and the Court found that denial of his reasonable requests violated due process.

In *Smith v. Ganske, supra*, a DUI suspect was allowed to contact a lawyer, who in turn made arrangements to have bond posted in an effort to secure the suspect's release to obtain an independent test. The person attempting to post bond was "given the run-around" by the Sheriff's Office and was, therefore, not able to secure the suspect's release in a timely fashion. Again, it was found that the State's unreasonable actions violated due process.

In *McNutt v. Superior Court, supra*, without any good reason a suspect was not allowed to contact his lawyer until after his release, some two and a half hours after arrest. The court found that this unreasonable delay in allowing the suspect to phone his attorney to have an independent test arranged violated due process.

In *Amos v. Bowen, supra*, a police officer volunteered to take a suspect to a hospital to arrange an independent test, but was unfortunately delayed in transit for two hours while attending to an emergency. During the two-hour delay, the suspect changed his mind, feeling that too much time had elapsed. The court found a violation of due process due to the delay at the hands of the State.

In *State v. Klein, supra*, a suspect made reasonable efforts to have his mother post bond so that he could be released to obtain an independent test. The arresting officer was found to have obstructed communications between the suspect and his mother, and told the mother that no bond schedule existed for a felony DUI arrest. The

court found that the officer's actions unreasonably interfered with the suspect's efforts to gain release to obtain an independent test, with a resulting violation of due process.

However, a contrary decision was reached in *State v. Leonard*, 151 Ariz. 1, 725 P.2d 493 (App. 1986). In *Leonard*, the suspect was allowed to make several phone calls to attempt to arrange an independent test. He was not successful in doing so. The suspect was transported from Sedona to Flagstaff for booking, and the officer intended to allow the suspect to continue his efforts to arrange a test upon arrival in Flagstaff. The suspect, however, made no further attempts to arrange his test upon arrival in Flagstaff. The Court held that the officer's efforts to accommodate the suspect's desire to arrange a test were reasonable under the circumstances, and found no violation of due process.

Clearly, a decision as to whether the State has unreasonably interfered with an accused's attempts to secure independent evidence requires an evaluation of the facts and circumstances of that particular case. When this Court evaluates the facts of the case at bar, this Court will conclude that the State did not interfere with the defendant's ability to obtain an independent test. As outlined in *Leonard, supra*, officers are not required to assist a defendant in procuring an independent blood test. If the defendant was unsuccessful in obtaining a blood test, it was not because of the officer's actions (or, in this case, lack of action).

Furthermore, unlike in *Cada* and *McNutt*, the defendant in the instant case was not denied his right to contact an attorney. Later, the defendant was booked into the Madison Street Jail. During the booking process, defendant was placed in a holding

tank, which contains a charge-a-call telephone. While at the jail, the defendant did not ask for an independent chemical test.

The defendant in this case had several opportunities to arrange for an independent test. If he failed to obtain an independent test, it was not because he was booked in jail and it was not because of anything the officers did or failed to do. Therefore, the State respectfully requests this Court to deny the defendant's Motion to Dismiss.